Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVEN RUSHING,

Petitioner

v.

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

On Petition for A Writ of Certiorari
To the First Circuit Court of Appeal of
The State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are a public employee's complaints regarding issues of professional funding processes and the repudiation of grievance procedures matters of "public concern" under this Court's ruling in *Connick v. Myers*, 461 U.S. 138 (1983), notwithstanding the partially private motivation for the speech?

2. Does an employer's conduct in suspending an academic with pay for eleven months and barring him from recourse to mandated grievance procedures constitute an actionable retaliation under 42 U.S.C. § 2000e-3(a), 42 U.S.C. § 12203(a), and 42 U.S.C. § 1983, even in the absence of direct causation of an EEOC filing with an adverse employment action?

3. Does a deprivation of a property right, cognizable under the Fourteenth Amendment, occur when a public employer significantly alters the professional duties of a public employee, refuses to follow a mandated grievance procedure, and then absolutely bars that employee from recourse to the grievance procedure?

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PETITION FOR WRIT OF CERTIORARI

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The May 14, 2004, opinion and judgment of the Louisiana Court of Appeal for the First Circuit is unpublished and reprinted herein. *See* App. 1a. Petitioner sought review in the Louisiana Supreme Court, and on November 8, 2004, such was denied. *See* 885 So.2d 1136 (La.2004); App. 26a.

The Louisiana Court of Appeal decision was in response to an appeal of an unreported judgment and bench ruling of the Louisiana Nineteenth Judicial District Court for the Parish of East Baton Rouge, dated March 17, 2003. *See* App. 23a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Louisiana Court of Appeal for the First Circuit, of May 14, 2004. Petitioner's request for review by the Louisiana Supreme Court was denied on November 8, 2004. App. 26a. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

At issue in this Petition is the Due Process Clause of the Fourteenth Amendment, as well as the relevant antidiscrimination and non-retaliation provisions of the Civil Rights Act and the Americans with Disabilities Act. For the relevant statutory excerpts, see App. 27a–28a.

STATEMENT OF THE CASE

1. This is an action for declaratory and injunctive relief and damages brought by a tenured university professor,[1] Dr. Steven Rushing, against the Board of Supervisors of the University of Louisiana System (Southeastern Louisiana University) (*hereinafter* "SLU"). Dr. Rushing's claims arise out of his attempts to have several grievances heard by university officials. These grievances concern the process SLU uses for approving grants to faculty members for research and creative endeavors, the process SLU uses for processing grievances, and the terms and conditions of Dr. Rushing's tenured employment.

The terms and conditions of Dr. Rushing's employment with SLU were expressly agreed upon in writing. On September 15, 2001, Dr. Randy Moffett, Provost of SLU, sent a letter to Dr. Rushing confirming Dr. Rushing's tenured faculty appointment for the 2001–2002 academic year. This letter stated "the terms of your employment are stated in the Southeastern Louisiana University Faculty Handbook." This letter of agreement and the Faculty Handbook incorporated therein and adopted by reference thereby constitute the employment agreement between the parties.

The Faculty Handbook sets forth a contractual grievance procedure for the resolution of disputes as to the terms and conditions of employment of tenured faculty members. This grievance process provides for hearings at every step of the grievance process. Hearings are mandatory

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[1] The fact that Dr. Rushing was a tenured faculty member conclusively shows that his employment was not "at will." Thus, not only could his employment not be unilaterally terminated by SLU (except "for cause"), but also the terms and conditions of that employment could not be unilaterally changed.

at the initial stages of the grievance process.

2. On November 11, 1998, in accordance with the contractual grievance procedure, Dr. Rushing filed Grievance No. 1 against Julian Azorlosa, former chair of the Research and Grants Committee; Dr. Paul Riggs, the Director of the Office of Academic Services; the Office of Academic Services; the Office of Sponsored Research and Contracts; and the members of the Research and Grants Committee. The grievance was concerned with SLU's grant-approval process, which Dr. Rushing asserted lacks standards and is administered in an arbitrary and discriminatory fashion which disfavors certain individuals and groups of faculty members, particularly those in the arts. The grievance was unilaterally declared "abandoned" by the Grievance Committee, the University Provost and the University President. There is no basis for such a disposition in the grievance procedure. Dr. Rushing appealed this first grievance to the Board of Supervisors in accordance with the grievance procedure. The Board of Supervisors affirmed the action of SLU without providing Dr. Rushing with a hearing.

On December 16, 1998, Dr. Rushing filed Grievance No. 2 against Dr. Victor Bissonette, Chair of the Research and Grants Committee, which related to his denial of Dr. Rushing's request to bring concerns about grants funding before the September 11, 1998, meeting of the Research and Grants Committee. Grievance No. 2 was also unilaterally declared "abandoned" by the Grievance Committee, the University Provost, and the University President. Dr. Rushing then appealed his second grievance to the Board of Supervisors, which again denied him a hearing.

On January 22, 1999, Dr. Rushing filed Grievance No. 3 against the SLU Grievance Committee. In this grievance, he charged the Faculty Grievance Committee with the violation, misrepresentation, misapplication, and/or inequitable or otherwise improper application of the rules of

the University of Louisiana System. Both the Grievance Committee and the University Provost denied Dr. Rushing a hearing on this grievance. The University President declined to render a decision on this grievance. Dr. Rushing then appealed Grievance No. 3 to the Board of Supervisors, which once again denied him a hearing.

On March 7, 1999, Dr. Rushing filed Grievance No. 4 against Dr. Randy Moffett, Provost of SLU, for Dr. Moffett's failure to conduct a hearing on Grievances Nos. 2 and 3 in accordance with the Faculty Handbook, for not acting in good faith, for negligence, and for malfeasance in office. The Grievance Committee denied Dr. Rushing a hearing on this grievance.

On March 16, 1999, Dr. Rushing filed Grievance No. 5 against Dr. Sally Clausen, University President, for undermining his grievances, obstruction of his right to due process, and for unilaterally declaring his grievances "abandoned." The Grievance Committee denied Dr. Rushing a hearing on this grievance.

On April 11, 1999, Dr. Rushing filed Grievance No. 6 against the Chairman of the Music Department, Dr. David Evenson, regarding the removal of one of Dr. Rushing's students from his voice studio, which he considered to be a violation of his Academic Freedom.[2] Dr. John Miller, Dean of the College of Arts and Sciences, failed to respond to the grievance in accordance with SLU grievance procedures by not timely rendering a decision on the grievance.

University officials then began to retaliate against Dr. Rushing for filing these grievances. On April 26, 1999, Dr. Rushing was placed on forced leave with pay pending

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[2] On August 17, 1999, Dr. Rushing amended his sixth grievance statement against Dr. Evenson to include breach of contract and violations of Board of Supervisor's rules.

conclusion of an investigation of his "recent job performance and conduct towards students and colleagues." The alleged basis for suspending Dr. Rushing was an incident between him and another music professor, Dr. Scharmal Schrock, surrounding whether Dr. Schrock should take over the teaching of a student who had been taking voice lessons from Dr. Rushing. On April 13, 1999, Dr. Rushing and Dr. Schrock had an animated discussion in Dr. Schrock's studio, in the presence of the student. Following their discussion, Dr. Schrock apparently filled out a Victim/Witness Statement Form, in which she stated that Dr. Rushing told her in a telephone conversation later that day that he "cared enough about the integrity of this University to '...destroy it'," referring to writings of the British author/philosopher G.K. Chesterton.[3] Dr. Moffett testified that he suspended Dr. Rushing from his position as music professor based on this incident, without a hearing, pending an investigation.

After sending two letters to Dr. Moffett, dated July 24, 1999 and July 29, 1999, regarding the leave with pay which had been imposed, Dr. Rushing was eventually allowed to return to work on August 12, 1999, before an investigation had been completed and with a retraction of the forced leave. In August and September of 1999, an Ad Hoc Committee appointed by Dr. Clausen investigated the incident with Dr. Schrock. Dr. Rushing informed the committee that he made no personal threats to Dr. Schrock, the student, or the university. The comments made by Dr. Rushing to Dr. Schrock during the discussion on April 13 referred to Dr. Rushing's intent to expose certain key university officials for

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[3] G.K. Chesterton is a renowned Catholic theologian who in no way advocates violence. The reference was not meant as a physical threat of violence, but as a means of conveying a philosophical idea about education. In fact, the Ad Hoc Committee who later reviewed this incident found that Dr. Schrock knew Dr. Rushing did not intend physical harm.

obstruction of justice, violations of university regulations, and other grievable offenses. Following its investigation, the committee concluded that Dr. Rushing did not pose a "credible threat," which is defined by university policy as "a statement or action that would cause a reasonable person to fear for the safety of him/herself or that of another person, and in fact, cause such fear."

Nonetheless, the retaliation continued. Dr. Rushing filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge on September 13, 1999. The gravamen of his claims was that SLU officials attempted to frustrate his efforts to have his grievances heard, including claiming inaccurately that his grievances were improperly filed, and claiming inaccurately that grievances could not be made against certain individuals or committees.[4] On October 5, 1999, University President Sally Clausen ordered Dr. Rushing to undergo counseling for the purported purpose of helping him manage his anger, despite the fact that the findings of the Ad Hoc Committee had been reported to her and without determining that Dr. Rushing actually needed anger management therapy.[5] At the time, SLU knew that Dr. Rushing was already undergoing counseling for depression and that no health care provider had prescribed or recommended any treatment for anger management. Two days later, on October 7, 1999, Dr. Rushing's attorney wrote Dr. Clausen, questioning her order.

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[4] Dr. Rushing later amended his petition to include allegations that SLU attempted to employ economic coercion to force him to drop his grievances.

[5] In a subsequent letter, dated March 21, 2000, Dr. Rushing's treating physician, Dr. Gerald Heintz, wrote, "I do not feel that specific anger management training is needed as outward anger seems an infrequent problem." Dr. Clausen acknowledged receipt of the letter from Dr. Heintz, yet still did not reinstate Dr. Rushing until June 23, 2000, a full three (3) months later.

On October 19, 1999, Dr. Rushing filed Grievance No. 7, which concerned allegations of harassment and discrimination based upon his depression.[6] On November 2, 1999, SLU's attorney advised the SLU administration by letter to "cease participation in all grievance procedures involving Dr. Rushing during the pendency of the lawsuit filed by him."[7] This advice was accepted by the SLU Administration. On November 19, 1999, Dr. Rushing's attorney informed Dr. Clausen by letter that she had no authority to order Dr. Rushing into counseling for anger management and that she was invading his privacy in so doing. On November 23, 1999, Dr. Clausen placed Dr. Rushing on administrative leave with pay for failing to provide evidence that he had sought counseling for anger management by a licensed counselor. On December 21, 1999, Dr. Rushing's attorney sent Dr. Clausen a report which stated that Dr. Rushing was being treated for recurrent major depression. On January 6, 2000, Dr. Clausen placed Dr. Rushing "on administrative leave without pay, effective today, January 6, 2000."

On January 23, 2000, Dr. Rushing sent a Petition for Reinstatement and Grievance Hearing Against and Investigation of Dr. Sally Clausen (Grievance No. 8) to Mr. Bobby Jindal, who was then President of the University of Louisiana System. Dr. Rushing sought to be reinstated and to have Dr. Clausen investigated for due process violations regarding his suspension. The certified correspondence was returned unopened and marked "refused." On January 27,

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[6] Dr. Rushing later filed an EEOC charge against SLU which was relative only to those facts associated with Grievance No. 7 and disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA").

[7] Like the other contrivances utilized by the University to deny Dr. Rushing access to the contractual grievance procedure, there is no basis in the grievance procedure for such a position.

2000, Dr. Rushing sent a Memorandum in Support of his Petition for Reinstatement to Bobby Jindal. Again, the certified correspondence was returned, marked "refused."

On March 3, 2000, Dr. Carroll Falcon, Southeastern Louisiana University's Vice President of Academic Affairs, informed Dr. Rushing that he would not be granted a hearing on his Petition for Reinstatement and Grievance Hearing Against and Investigation of Dr. Sally Clausen, or any other grievance he had filed, until his lawsuit and prior grievances had been resolved. This letter stated, "[t]he Board is aware of your grievances currently pending at the University as well as the litigation involving your complaint. When these processes are exhausted, you may then appeal to the Board if resolution is not your satisfaction."

On May 1, 2002, Dr. Rushing submitted Grievance No. 9, which he amended on November 25, 2002, and which concerned a complaint regarding his work situation at SLU. Dr. Evenson refused to conduct a hearing on this grievance.

3. At the trial court level, Dr. Rushing presented substantial evidentiary support of his claims. Nevertheless, on March 17, 2003, the District Court granted the defendant's motion for summary judgment and dismissed all of Dr. Rushing's claims without a trial. App. 23a. Thereafter, Dr. Rushing perfected a devolutive appeal to the Louisiana Court of Appeal for the First Circuit. On May 14, 2004, the First Circuit affirmed the trial court's decision. App. 1a. However, Judge Edward J. Gaidry filed a vigorous dissent. App. 12a. Dr. Rushing's application for rehearing was denied on June 28, 2004. On November 8, 2004, the Louisiana Supreme Court denied Dr. Rushing's Application for Writs of Review. App. 26a. This timely Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NECESSITATED BY THE DEEP AND INTRACTABLE SPLIT IN AUTHORITY CONCERNING THE ROLE OF PRIVATE MOTIVATION IN DETERMINING WHETHER A PUBLIC EMPLOYEE'S SPEECH IS OF "PUBLIC CONCERN"

This Petition invites the Court to revisit the nettlesome question of what sorts of speech by public employees qualify as being of "public concern," for purposes of a retaliation claim under 42 U.S.C. § 1983 and the First Amendment. More specifically, this Petition raises—on a succinct and well-defined record—the precise question of whether a public employee's partially private motivation in raising certain issues of public interest disqualifies the speech from being of "public concern." This issue was specifically left open by this Court in its last foray on the subject of public employee speech, *see City of San Diego v. Roe*, 125 S.Ct. 521, 523–24, 525–26 (2004) (per curiam), and the Court should now take the opportunity to resolve a question that has vexed the jurisprudence of the courts of appeals and of state courts following federal decisional law.

1. The broad contours of this Court's public employee speech decisions are straightforward enough.

> A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.... The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.

San Diego, 125 S.Ct. at 523–24 (internal citations omitted).

Connick v. Myers, 461 U.S. 138 (1983), establishes a two-step inquiry for the nature of public employee speech. In the first step, it is determined whether the particular speech is of "public concern," which the *Connick* Court very generally characterized as when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. If speech is determined to be of "public concern," then the second prong of the analysis comes into play. To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* and *Connick* Courts adopted a balancing test. *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968). It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568.

This Petition involves only the first prong of the *Connick-Pickering* test—the characterization of a public employee's speech as being of public concern. The Louisiana court, in rendering a decision here, ruled only that Petitioner's speech was (at least) partially privately motivated, and so "clearly a personal matter." App. 10a. The finding of the Louisiana court indicates that speech containing any element of private interest, however small, necessarily cannot also be of public concern and therefore protected by the First Amendment. That court, thus, did not reach the *Pickering* balancing inquiry.

2. With some sense of understatement, this Court has recently observed that "the boundaries of the public concern test are not well-defined...." *City of San Diego*, 125 S.Ct. at

525. Nonetheless, this Court has noted that

> *Connick* ... directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern.... [T]he standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present.

Id. at 525–26 (internal citations omitted). This Court also reiterated that

> [P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Id. (internal citations omitted). *See also Connick*, 461 U.S. at 146 (speech of "pubic concern" is anything referring "to any matter of political, social, or other concerns of the community").

If this Petition merely sought this Court's guidance as to the application of the *Connick* "public concern" test in the context of a particular set of facts, it would justifiably not receive favorable consideration. Petitioner acknowledges that the *Connick* test is sufficiently fact-nuanced to be impervious to general rules and characterizations in most circumstances. Nevertheless, this Court's review is required here because the underlying question in many "public concern" cases for public employee speech—whether the employee statements have to be *exclusively* motivated by the public interest, or whether it is permissible for there to be *some* private motive

in their enunciation—remains unresolved. It is essential that this legal question be settled, because, as the *Connick* Court held, "[t]he inquiry into the protected nature of speech is one of law, not fact." 461 U.S. at 147–48 n.7.

3. The source of the conflict as to the role of private motivation or interest in making a public employees' speech of public concern, alas, can be traced to *Connick* itself. As noted above, the *Connick* decision appears to acknowledge that some sorts of "private remarks ... touch on matters of public concern," *City of San Diego*, 125 S.Ct. at 525–26 (citing *Connick* and *Rankin v. McPherson*, 483 U.S. 378 (1987)). At the same time, *Connick* explained that when an "employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick*, 461 U.S. at 147. This analytic dissonance in *Connick*, as to the role of private motivation or interest, has apparently created confusion and left unanswered questions among the courts of appeals and state courts. *Pool v. VanRheen*, 297 F.3d 899, 907 n.4. (9th Cir.2002) ("although *Connick* provides for a limited type of First Amendment protection, it is difficult to apply this nebulous standard"); *O'Conner v. Steeves*, 994 F.2d 905, 913 (1st Cir.1993) ("the courts of appeals have adopted various approaches for determining whether a topic of employee speech is of 'public concern,' under the ''threshold inquiry' required by *Connick*").

Out of this confusion has evolved a distinct split in authority as to the role of private motivation or interest in establishing speech as being of "public concern."[8] Some

[8] Indeed, it is by no means clear that the courts of appeals have resolved the question of whether a speaker's motives are, in fact, material. *Compare Conway v. Smith*, 853 F.2d 789, 796 (10th

courts have held that a personal aspect of private motive will not remove speech from the scope of public concern. *Henley v. Horne*, 297 F.3d 344, 347 (4th Cir.2002) (personal motive of an employee who engaged in conversations regarding a coworker's claim that she had been sexually harassed on the job by employee's supervisor did not remove the speech from the area of public concern); *Greer v. Amesque*, 212 F.3d 358, 371 (7th Cir.2000) ("a personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern, for purposes of determining whether the termination of a public employee for engaging in the speech violates the employee's First Amendment rights"); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir.1994) ("a personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern"); *Thomas v. Beaverton*, 379 F.3d 802, 810 (9th Cir.2004) ("[b]ecause content is the most important factor, we have concluded that speech about a matter of public concern may be protected even when made in a private context").

A minority of decisions (including the one for which review is sought here) have held that speech that is in any way related to personal matters cannot be considered a matter of public concern, thus absolutely disqualifying speech that appears to have any private motivation or interest. This would constitute a far more stringent interpretation of "public concern." In these decisions, if the speech is in any way

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Cir.1988) (motivation of speaker is focus of public concern inquiry); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir.1987) (same); with *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir.1988) (content of speech is "notably overlooked" when courts focus on motivation of public employee); *Rode v. Dellacriprele*, 845 F.2d 1195, 1201 (3d Cir.1988) (same).

related to personal matters, even if it address matters of governmental misconduct, such speech can not be considered a matter of public concern. *See Farmer v. Cleveland Public Power*, 295 F.3d 593, 599 (6th Cir.2002) (speech that is of particular interest only to the speaker, unlike speech that touches on matters of public concern, cannot form the basis of a public employee's First Amendment retaliation lawsuit); *DeLlano v. Berglund*, 282 F.3d 1031, 1036 (8th Cir.2002) (speech of a personal nature contained in a letter complaining of governmental official's misconduct deemed not to be a matter of public concern); *Kemp v. State Bd. of Agriculture*, 803 P.2d 498 (Colo. 1990).

4. In this case, the Louisiana courts chose to align themselves with earlier jurisprudence of the U.S. Court of Appeals for the Fifth Circuit, holding that any private motivation or interest to the speech essentially disqualifies it from "public concern" status. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir.2000); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir.1992); *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 n.5 (5th Cir.1986). However, in the very recent case of *Johnson v. Louisiana*, 369 F.3d 826, 831 n.6 (5th Cir.2004), the Fifth Circuit retreated from this position and held, "Johnson may have been motivated in part by a personal dispute with Watson, but [a]n employee's speech may contain an element of personal interest and yet still qualify as speech on a matter of public concern."

Petitioner respectfully submits that application of the Fifth Circuit's earlier test impermissibly precluded his retaliation and First Amendment claim. As already noted, Petitioner's speech concerned the nature and extent of Respondent's commitment to professional funding processes for all faculty and creative staff at the University, particularly in the area of funding for the performing arts. *See* App. 2a, 25a. Additionally, Petitioner raised concerns about the

repudiation of the grievance procedures that applied to all of Respondent's faculty members. *See* App. 2a, 25a. To be sure, Petitioner had a personal stake in the issues he raised in the public forum of the University, and (in part) some of these issues arose out of particular personnel grievances he had with Respondent. Nevertheless, these issues were of public interest, insofar as they did not exclusively deal with "matters only of personal interest" to Petitioner, *Connick*, 461 U.S. at 147, and did implicate "matter[s] of political, social, or other concerns of the community." *Connick*, at 146.

Under *Connick*, courts should evaluate the totality of the speech at issue in determining whether it is of public concern. That is, the "content, form, and context ... as revealed by the whole record" should be examined. *Connick*, at 146–147. Had the case below been decided by a circuit or state court which adheres to *Connick*'s principles, Dr. Rushing's claim would have been given a proper, more thorough analysis. Instead, the court below, like many courts, short-circuited *Connick*'s full analysis by finding that any speech even partially motivated by personal interests or concerns could not be speech of public concern for purposes of retaliation or First Amendment violations. Not only does this subvert this Court's public employee speech jurisprudence, it also places insuperable barriers for expression in public offices and forums around the country, including the nation's public universities, which should be bastions of free and responsible inquiry. This Petition thus provides an excellent vehicle for the Court to resolve this threshold question for determinations of public employee speech that qualifies as being of "public concern."

II. THE REVIEW OF THIS COURT IS REQUIRED IN ORDER TO RESOLVE A SPLIT IN THE CIRCUITS CONCERNING THE TEMPORAL CAUSAL NEXUS WITH REGARD TO RETALIATION CLAIMS AND THE NATURE OF PROOF REQUIRED OF

ADVERSE EMPLOYMENT ACTIONS

1. The right to access to the courts and the right to petition government for the redress of grievances are protected by the First Amendment to the United States Constitution. The First Amendment also protects governmental employee's rights to participate in public affairs and to express themselves on matters of public concern. *Connick*, at 144; *Rathjen v. Litchfield*, 878 F.3d 836, 842 (5th Cir.1979).

Nevertheless, the Louisiana courts held that Dr. Rushing did not set forth a cognizable First Amendment retaliation claim, despite the overwhelming evidence that SLU had retaliated against Petitioner precisely because he exercised his right to freedom of expression. Dr. Rushing respectfully submits that the Louisiana courts erred in so holding, but, more importantly, the decision below reveals a significant fracture in authority on key threshold questions concerning the nature and timing of retaliation claims.

2. The Louisiana Court of Appeal reasoned that SLU had established a legitimate, non-retaliatory reason for suspending Dr. Rushing. Nevertheless, the reason proffered by Southeastern Louisiana University and erroneously accepted by the Court of Appeal as conclusive on a motion for summary judgment[9] does not explain the timing of the allegedly retaliatory actions in relation to the timing of Dr. Rushing's grievances and lawsuit.

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[9] Even though this case was decided by Louisiana state courts, under the Supremacy Clause of the United States Constitution, state courts must not interpose obstacles to the accomplishment of the full purposes and objectives of Congress as set forth in federal statutes. *Felder v. Casey*, 108 S.Ct. 2302 (1988). "The Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Id.* at 2313–14.

Dr. Rushing filed his lawsuit on September 13, 1999. On October 15, 1999, Dr. Rushing was ordered to undergo anger management counseling. He filed his grievance No. 7 on October 19, 1999. On November 2, 1999, Southeastern Louisiana University "suspended" Dr. Rushing's contractual rights to the grievance process.[10] This was almost *seven months* after the incident involving Ms. Schrock and Dr. Rushing which occurred on April 13, 1999. This also was after Dr. Rushing had been reinstated on August 12, 1999, and approximately two (2) months after the committee reviewing the incident issued its report on September 2, 1999, finding that Dr. Rushing did not pose a "credible threat." On November 23, 1999, Dr. Clausen placed Dr. Rushing on forced administrative leave with pay. Therefore, in the course of a little over two (2) months after the filing of his lawsuit and grievance No. 7, Dr. Rushing was ordered to undergo counseling he did not need, his access to the contractual grievance process was "suspended," and he was placed on forced leave. This forced leave lasted for approximately eleven (11) months,[11] during which Dr.

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[10] Petitioner asserts that this suspension of his rights to the grievance procedures violated the First Amendment under Fifth Circuit precedence:

> The Constitution does not require a public employer either to establish a grievance procedure or to respond to grievances lodged by its employees.... Nevertheless, if a public employer voluntarily establishes a grievance procedure, then discriminates or retaliates against union members in administering that process, it violates the first amendment.

Professional Association of College Educators v. El Paso County Community College District, 730 F.2d 258, 263 (5th Cir.1984) (internal citations omitted).

[11] Dr. Rushing was on forced leave from April 26, 1999 through August 12, 1999, and again from November 23, 1999 through June 23, 2000.

Rushing was prohibited from not only teaching, but also from research and service activities and opportunities.

Despite the University's claim of a non-retaliatory motive, the United States Circuit Courts of Appeals have consistently held that a causal connection between the protected activity and the adverse personnel action can be inferred if the protected activity is followed closely in time by adverse action. *See, e.g., Thomas v. Beaverton*, 379 F.3d 802, 812 (9th Cir.2004) ("[t]he causal link between a protected activity and the alleged retaliatory action 'can be inferred from the timing alone' when there is a close proximity between the two"); *Coszalter v. City of Salem*, 320 F.3d. 968, 977 (9th Cir.2003) ("[d]epending on the circumstances, three to eight months is easily a time range that can support an inference of retaliation"); *Meyers v. Nebraska Health and Human Services*, 324 F.3d. 655 (8th Cir.2003); *Evans v. City of Houston*, 246 F.3d. 344, 354 (5th Cir.2001) (a "time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes"); and *Poole v. County of Otero*, 271 F.3d. 955 (10th Cir.2001).

The Louisiana court's ruling on the temporal nexus of First Amendment retaliation claims is thus contrary to the great weight of court of appeals authority.[12] To the extent that the Louisiana courts were relying on some contrary authority to establish some absolute, narrow time range in which retaliatory action must be initiated by an employer, in order to be actionable, such runs contrary to the majority view of courts.

3. Implicated in the Louisiana court's decision below was a ruling as to whether Petitioner had actually suffered an adverse employment action within the meaning of the relevant statutory and common law premises for retaliation

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[12] The U.S. Supreme Court has apparently never addressed the timing-inference issue.

claims. By ruling that Dr. Rushing's right to freedom of expression was not abridged when the University denied him access to the grievance process, App. 10a–12a, the implication is that he suffered no adverse employment consequences by reason of his speech. This ruling reveals an extraordinary split in the federal circuits as to whether the type of actions which were taken against Dr. Rushing by the University constitutes actionable retaliation under federal law.

The United States Court of Appeals for the Fifth Circuit[13] takes the position that in order for retaliation to be actionable, the employer must take an "adverse employment action" against the employee and that the "adverse employment action must be an "ultimate employment decision." *Mattern v. Eastman Kodak Co.*, 104 F.3d. 702, 705 (5th Cir.1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336 (1997). According to the Fifth Circuit, "ultimate employment decisions" include acts such as hiring, granting leave, discharging, promoting and compensating. *Id.*; *see also*, *Brazoria County, Texas v. Equal Employment Opportunity Commission*, 391 F.3d 685 (5th Cir.2004); *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir.2002), *on reh'g*, 313 F3d. 879 (5th Cir.2002); *Dollis v. Rubin*, 77 F.3d. 777 (5th

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[13] Louisiana state courts typically follow the jurisprudence of the United States Court of Appeals for the Fifth Circuit in adjudicating issues of federal law. In *Chase v. Louisiana Riverboat Gaming Partnership*, 30,368 (La.App. 2 Cir.2/25/98), 709 So.2d 904, the Louisiana Court of Appeal for the Second Circuit stated, "where ... the precise issue before us has been dispositively addressed in the intermediate federal appellate court that covers the same geographical area as this court, we should be extremely hesitant to differ with the federal court." *Chase*, at 908 (*quoting Gaspard v. Transworld Drilling Co.*, 468 So.2d 692 (La.App. 3 Cir.1985), *writ denied*, 474 So.2d 1304 (La.1985), *cert. denied*, 475 U.S. 1067, 106 S.Ct. 1382 (1986).

Cir.1995). Only the Eighth Circuit sides with the Fifth Circuit on this issue. *See Ledergerber v. Stangler*, 122 F.3d. 1142 (8th Cir.1997).[14]

The First, Fourth, Sixth, Ninth, Tenth and Eleventh Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See, e.g., Wideman v. Wal-Mart Stores*, 141 F.3d. 1453 (11th Cir.1998); *Stauropoulis v. Firestone*, 361 F.3d 610, 616–17 (11th Cir.2004) ("[t]o be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must meet some threshold level of substantiality"); *White v. Burlington Northern and Santa Fe Railroad Company*, 364 F.3d 789 (6th Cir.2004); *Von Gunter v. State of Maryland*, 243 F.3d. 858 (4th Cir.2001); *Berry v. Stevinson Chevrolet*, 74 F.3d. 980 (10th Cir.1996); *Wyatt v. City of Boston*, 35 F.3d. 13 (1st Cir.1994); *Welch v. Derwinski*, 14 F.3d 85 (1st Cir.1994); *Passer v. American Chemical Society*, 935 F.2d. 322 (D.C.Cir.1991); and *Yartzoff v. Thomas*, 809 F.3d 1371 (9th Cir.1987).

In *Coszalter v. City of Salem*, 320 F.3d. 968, 975–76 (9th Cir.2003), the Court set forth what petitioner believes to be the correct inquiry in determining whether there is actionable retaliation in response to the exercise of First Amendment freedoms:

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[14] In *White v. Burlington Northern and Santa Fe Railroad Company*, 364 F.3d 789 (6th Cir.2004), the Sixth Circuit observed that, while the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard, citing *Manning v. Metropolitan Life Insurance Company*, 127 F.3d 686, 692 (8th Cir.1997), and *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir.1997). *See also Meyers v. Nebraska Health and Human Services, supra*, at 660, in which the Eighth Circuit applied a broader standard in a § 1983 action.

> Various kinds of employment actions may have an impermissible chilling effect. Depending on the circumstances, even minor acts of retaliation can infringe on an employee's First Amendment rights.... To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.... The relevant inquiry is whether the state had taken "action designed to retaliate against and chill political expression."

The "ultimate employment decision" requirement which is imposed by the Title VII jurisprudence of the Fifth and Eighth Circuits is inconsistent with the statutory texts of 42 U.S.C. § 2000e-3(a) and 42 U.S.C. § 12203(a), which simply make unlawful to "discriminate" in reprisal for protected activity, as well as the remedial purposes of these statutes.[15] *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d at 1456. *See also*, *White v. Burlington Northern*, 364 F.3d at 801–02.

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[15] Indeed, the Fifth Circuit recognizes that the "ultimate employment decision" requirement is inconsistent with other courts of appeals, as well as with rulings from the U.S. Supreme Court. For example, in the case of *Kang v. Board of Supervisors of Louisiana State University*, the three judge panel stated, "we have ourselves noted that 'the continuing vitality of the "ultimate employment decision" doctrine is questionable in the light of' recent Supreme Court decisions." 75 Fed.Appx. 974, 977, 2003 WL 22272920 (5th Cir.2003). That panel, however, declined to overrule the "ultimate employment decision" doctrine until that doctrine was "overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc." *Id.*, *citing Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir.2001).

The anti-retaliation jurisprudence of the Circuit Courts under 42 U.S.C. § 1983 is even broader than the majority position of the circuits under Title VII. *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir.2003); *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir.1999). In *Meyers v. Nebraska Health and Human Services*, the Eighth Circuit held, in a § 1983 action, that "to be actionable, the employment action must be 'a material change in the terms or conditions of her employment.'" *Meyers*, at 660. The Eighth Circuit went on to conclude that whether changes in the intangible employment conditions were significant or material remains a disputed issue of material fact for the jury to decide.

Moreover, the position of the Fifth and Eighth Circuits as to Title VII retaliation is inconsistent with the holding and rationale of this Court in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). *See Brazoria County, Texas vs. EEOC*, 391 F.3d 685 (2004), J. Pickering dissenting. *Robinson* held that a terminated employee could bring a post-employment retaliation suit against the employee's former employer for giving an unfavorable letter of reference. *Robinson*, at 339. Justice Thomas wrote for a unanimous Supreme Court:

> According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: *Maintaining unfettered access to statutory remedial mechanisms.*

Id., at 345–46 (citations omitted) (emphasis in original). Dr. Rushing respectfully submits that the actions taken against

him by SLU were certainly much more serious actions of retaliation than the negative reference letter at issue in *Robinson*.

Moreover, the "ultimate employment decision" requirement is inconsistent with EEOC guidelines. The EEOC has interpretated the term "adverse employment action" in the context of a Title VII retaliation claim to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected conduct." *EEOC Compliance Manual*, § 8000 (1998). Although EEOC guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161 (1944)); *White v. Burlington Northern & Santa Fe Railroad Co.*, *supra* (en banc). Courts have frequently drawn guidance from the EEOC Compliance Manual. *See*, *e.g.*, *Bradgon v. Abbott*, 524 U.S. 624, 646–47, 118 S.Ct. 2196, 2209 (1998); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir.1996); and *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847, 856 (5th Cir.1999).

The EEOC disagrees with the conclusion that an adverse action must qualify as an "ultimate employment decision" or must materially affect the terms or conditions of employment to constitute retaliation. *See id.* "The retaliation provisions set no qualifiers on the term 'to discriminate', and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity," *Id.*, *citing Knox v. State of Indiana*, 93 F.3d 1332, 1334 (7th Cir.1996) ("[t]here is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint"), *and citing Passer v. American Chemical Society*, 935 F.2d 322, 331

(D.C.Cir.1991) (the anti-retaliation provision in Title VII does not "limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion"). Indeed, the EEOC Compliance Manual specifically provides in Section 8-II.D.1 that "[s]uspending or limiting access to an internal grievance procedure also constitutes an 'adverse action.'"

5. The Louisiana Court of Appeal also held that Dr. Rushing had the burden of proving that "but-for" the protected activity, the adverse employment actions would not have occurred. *See* App. 11a (citing *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir.1999)). However, the "but-for" causation rule cited by the Court of Appeal is clearly inconsistent with *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003). Under the mixed-motive analysis, the fact that the adverse employment actions may have been motivated by a legitimate reason (*i.e.*, the Schrock incident) does not preclude the fact that these actions may also been motivated by an illegitimate reason (*i.e.*, Dr. Rushing's grievances).[16] Here, the Louisiana appellate court integrated an actual "but-for" test, placing the entire burden on the plaintiff, with no analysis of whether there was a mixed motive or proof of a pretext. Indeed, using the state court's view, there is no possibility of burden-shifting, directly in

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[16] Even so, the U.S. Court of Appeals for the Fifth Circuit continues to use the "but-for" language, thus indicating to Louisiana state courts that "but-for" is the proper standard. *See, e.g., Machinchick v. PB Power, Inc.*, 2005 WL 138708, n.33 (5th Cir.2005) (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir.1995)). The Fifth Circuit, post-*Desert Palace*, has continued to give lip-service to a "but-for" test, without actually enunciating a substitute standard. The reality, however, is that the burden of proof under *Desert Palace* is quite different than the standard imposed by the Louisiana First Circuit Court of Appeal in this case—a result of the confusion within the federal court of appeals as to the language to be employed when referring to the proper standard.

contradiction of *Desert Palace*, its predecessors, and its progeny. Clearly, *Desert Palace* should have jettisoned any vestige of the "but-for" causation rule in employment discrimination cases.

This Court should grant review as to both the questions concerning the timing nexus and nature of adverse employment actions in First Amendment retaliation cases.

III. ALSO REQUIRING THIS COURT'S REVIEW IS THE EXTENT TO WHICH PUBLIC EMPLOYEES HAVE A COGNIZABLE PROPERTY INTEREST WHEN A PUBLIC EMPLOYER SIGNIFICANTLY ALTERS THEIR PROFESSIONAL DUTIES AND STATURE, AND DENIES THEM ALL ACCESS TO GRIEVANCE PROCEDURES MANDATED BY EMPLOYMENT AGREEMENTS

The Louisiana courts, relying on federal court precedent, ruled that Petitioner was not deprived of a cognizable property interest in his employment, requiring procedural due process, even after being suspended with pay for seven (7) months and being denied all access to the grievance procedures that were mandated as part of his employment agreement with Respondent University. *See* App. 8a–9a (*citing Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985); and *Huang v. Board of Governors of Univ. of N. Carolina*, 902 F.2d 1134, 1141 (4th Cir.1990)). Even the truncated analysis of the Louisiana courts reveals a major split in authority among the federal circuits as to (1) whether (especially as regards tenured academics) a demotion or radical change in professional duties or stature can constitute a cognizable deprivation of property; and (2) whether denial of all access to a contractually-mandated grievance procedure for employees also constitutes a cognizable deprivation of property. The Louisiana courts answered these two inquiries in the negative, *see* App. 8a–9a, but both questions have spawned substantial discord in

federal case law.

1. The foundational decisions for this Court's protected property rights jurisprudence, especially for those teaching at institutions of higher learning, remains *Board of Regents of State Colleges v Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). The heart of these rulings was this Court's conclusions that "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 576–77. This Court also held that

> 'Property' interests subject to procedural due process protection are not limited by a few rigid, technical forms.... A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.... Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in light of the surrounding circumstances.

Perry, 408 U.S. at 601–02; *see also Roth*, 408 U.S. at 577.

Based on this language, some courts of appeals have held that an academic may suffer a cognizable property deprivation in situations where there is no reduction in salary, or in rank, because of an adverse employment action. In *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th Cir.1994), the Petitioner, Winegar, had been an industrial arts teacher at the same high school for 19 years with an unblemished record when he became involved in an altercation with a student. Afterwards, he was

suspended for several days and then transferred to another school. He brought suit alleging deprivation of property in violation of the Due Process Clause because he was not afforded any type of hearing or a fair opportunity to respond to the charges of child abuse. The Eighth Circuit found that the deprivations—the suspension and the transfer—were significant, holding that "[t]he transfer, which might not implicate due process interests if executed for ordinary business or administrative reasons, must also enter into the calculus here. An employee can have a protected property interest in a benefit, such as a particular assignment or duty station, if he legitimately expects to continue in that assignment or duty station." 20 F.3d at 900 (citations omitted).

More recently, the Seventh Circuit has also recognized that tenured professors may have a property right in their professional stature that entitles them to due process incident to a dramatic change in professional duties. *See Wozniak v. Conry*, 236 F.3d 888 (7th Cir.2001). There, a tenured professor was barred from teaching any class, his research funds were canceled, and he was reassigned to manage a faculty web site. However, despite the fact that the university did not reduce his salary or formally change his title, the Seventh Circuit recognized that he was "effectively shuttled from the faculty to the administrative staff" and that his award of tenure was "as a faculty member and not just as an all-purpose employee equally suited to the classroom and the janitorial staff." *Id.*, at 889–90. The Court found that the professor had created a factual question as to "whether the university had deprived him of his professional stature, a form of property interest—for an employer that strips an employee of the ordinary incidents of the job, in a way that could lead a reasonable, self-respecting person to resign, has constructively discharged that person even if the employee's title and salary are unaffected." *Id.*, at 890. In *Sharp v. City of Houston*, *supra*, the Fifth Circuit held, in a § 1983

retaliation claim, that a transfer can be an actionable demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement. The court went on to hold that the jury reasonably determined that a transfer from the elite mounted patrol to a teaching post at the police academy was, objectively, a demotion.

The foundation of these precedents was the Court's decision in *Perry* that "[a] property interest in employment can also be created by implied contract, arising out of customs, practices and de facto policies." *Winegar*, 20 F.3d at 899 (*citing Perry*, at 601–02). This is a fundamental principle which the Louisiana courts have ignored in property rights cases such as Petitioner's, thus aligning themselves with the U.S. Fourth Circuit Court of Appeals, *see Huang*, 902 F.2d at 1141 (relying on authority from other circuits[17]); and *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir.1990). At a minimum, there is a clear split between two circuits (the Seventh and Eighth) that would support the right of Dr. Rushing, in these circumstances, to make a cognizable property interest claim under the Due Process Clause insofar as he suffered a significant alteration of his professional duties and stature. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (undesirable reassignment may constitute a tangible employment action under Title VII); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (an adverse employment action does not have to be a dismissal to violate a public employee's First Amendment rights).

Petitioner is by no means suggesting, of course, that

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[17] *See Maples v. Martin*, 858 F.2d 1546, 1550–51 (11th Cir.1988); *Garvie v. Jackson*, 845 F.2d 647, 651 (6th Cir.1988); *Kelleher v. Flawn*, 761 F.2d 1079, 1087 (5th Cir.1985); *Volk v. Coler*, 845 F.2d 1422, 1430 (7th Cir.1988); *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir.1982).

every change in the conditions of employment would necessarily rise to the level of a cognizable property deprivation, triggering the procedural protections of the Due Process Clause under *Loudermill*. What Petitioner does submit, though, is that the mere fact that he did not suffer a loss in pay or compensation cannot be dispositive (as the Louisiana First Circuit held, *see* App. 9a, 16a, 17a) on this question. This case presents a superb vehicle for the Court to return to a question left open in *Roth* and *Perry*, and to resolve this conflict in the circuits.

2. Insofar as the Louisiana courts ruled that Petitioner had no cognizable property right in access to grievance procedures mandated by his employment agreement with Respondent University, *see* App. 9a, this, too, runs counter to this Court's procedural due process jurisprudence in the employment setting. *See Roth*, 408 U.S. at 577. In *Perry*, this Court held that, depending on the circumstances, a public university's non-contractual policies and practices could give rise to a property right. 408 U.S. at 601. Neither *Roth* nor *Perry* stated or made clear that certain rules or understandings—such as the right of a tenured public employee to have access to an employment grievance procedure—could represent a reasonable claim of expectation. However, access to a contractually-mandated grievance procedure would certainly appear to be a sort of provision that would qualify for constitutional protection under the procedural face of the Due Process Clause.

Lower courts have rejected cognizable property interests in other sorts of contractual expectations in the public employment context. *See Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1314 (3d Cir.1987); *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir.1986); *Goodisman v. Lytle*, 724 F.2d 818, 820–21 (9th Cir.1984); *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir.1981). But in each of these cases, the court of appeals

reserved the question of whether denial of access to a grievance procedure contained in the public employment agreement would rise to the level of a cognizable property deprivation. In other cases, circuit courts have held that where the contractual provision does not reflect a "trivial and insubstantial interest," it may give rise to a cognizable property right. *Ezekwo v. Health and Hospitals Corp.*, 940 F.2d 775, 782-83 (2d Cir.1991); *see also Ciambriello v. County of Nassau*, 292 F.3d 307, 313 (2d Cir.2002).

The Louisiana court's contrary interpretation of the Due Process Clause finds no support in this Court's jurisprudence, although this Court has not squarely addressed whether certain mutual understandings—particularly those foundational provisions granting access to a grievance procedure—may predicate a legally cognizable property interest. Certiorari is warranted to resolve this open question.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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